

No 23.

*** Fountainhall reports the same case :

BOTH Reid and Mann being creditors to Andrew Wall, (mentioned No 113. p. 1006), Bailie Reid offered to pay what he had confessed himself to be debtor by his oath in the furthcoming, but craved an assignation from James Mann to his cumulative security by adjudication, in so far as he should pay, that so he may recover his relief out of the common debtor's effects *pro tanto*. *Answered* for Mann, I cannot assign you to my adjudication, because that were to my own prejudice, seeing by all I recover from you I am not fully paid of my sum, but still want L. 300 of it, besides penalties and accumulations, which he extends no farther than to re-imburse his true expenses ; and no man can be forced to assign *cum proprio dispendio*. *Replied*, The assigning is founded both on natural equity and common law, the *jus cedendarum actionum* being never denied, and *les loix civiles dans leur ordre naturelle*, speaking of creditors competing on hypothecs, says, ' Posterior hypothecarius solvens hypothecario priori, ' ipso jure surrogatur in ejus locum et privilegium.' And in a reduction *ex capite inhibitionis*, the pursuer was decerned to assign to the defender who paid him with this quality and provision, that the assignation should not be made use of against the cedent's other debts and rights, Bruce *contra* Mitchell, No 19. p. 3365. ; 18th July 1676, Gordon *contra* Watson, No 4. p. 318. And Bailie Reid was content that the assignation he was craving should be clogged with that reservation, that it should never be made use of against the cedent, so that he, by virtue of that assignation, coming in *pari passu* with the other creditors, and drawing his share, he was willing that James Mann should, out of his share, be refunded of what was yet resting him, so as Reid might get what remained, which comes under the rule *vinco vincentem*. THE LORDS found the defence relevant, and ordained Mann to assign ; but with this express burden and quality, that Mr Mann should be preferred *quoad* his debt, and Reid the assignee should not compete with him for the same.

Fountainhall, v. 2. p. 301.

1708. February 24.

WILLIAM KENNEDY of Daljarroch *against* JOHN VANS, and HUGH CRAWFORD,
Merchants in Ayr.

No 24.

A creditor, by bond, in which three persons were bound as co-principals, being the first arrester of a subject be-

IN the competition betwixt John Vans and Hugh Crawford, as arresters of a share in the African stock belonging to David Ferguson their debtor, and William Kennedy of Daljarroch, who had also arrested the same as creditor to David Ferguson per bond, wherein he, Thomas M'Jarow, and John Ferguson stood bound co-principals ; Daljarroch being preferred, and thereby having re-

covered payment of all that was due to him, John Vans and Hugh Crawford craved that he might be decerned to assign his bond to them, for recovering, off the other two co-principals therein, the superplus of what was paid out of David Ferguson's effects more than this third share; in respect Vans and Crawford, as come in David Ferguson their debtor's place, should have the same relief that was competent to him.

Alleged for Daljarroch: He is not bound to assign the relief competent to David Ferguson against these bound with him; in respect the competitors neither derive right thereto from David Ferguson, nor have affected the same by legal diligence? for their being frustrated of payment out of the equivalent by Daljarroch's preference, entitles them only to seek assignation of his debt and diligence for operating their payment out of other effects belonging to the common debtor; but Daljarroch is not obliged to assign his right and diligence in so far as concerns third parties to whom Vans and Crawford are not creditors.

Answered for Vans and Crawford: In all competitions of creditors, where one having double security for his money, restricts his payment to one subject, and thereby excludes a co-creditor who had affected that subject, the creditor preferred is obliged to assign what further security he had to the other, though that other had not affected that additional security by diligence.

THE LORDS found, That Daljarroch is not bound to assign; because, Vans and Crawford had not affected by diligence the clause of relief in the bond granted to him.

Fol. Dic. v. 1. p. 224. Forbes, p. 249.

1710. December 21.

JEAN PITCAIRN, Relict of MR JOHN AINSWORTH Merchant in Edinburgh,
against THOMAS HALIDAY Bailie of Selkirk.

IN the pointing of the ground at the instance of Jean Pitcairn, as having right to an infeftment of annualrent effeiring to 1000 merks of principal, granted by James Mitchelhill in his lands of Kingscroft, dated and registered in the year 1704; Thomas Haliday, who had an infeftment of annualrent out of the same lands in anno 1701, and also out of James Mitchelhill's burrow-lands in Selkirk in the year 1700, for the principal sum of L. 1280, and another infeftment of annualrent out of the foresaid lands of Kingscroft, and burrow-lands in the year 1707, for the accumulate sum of L. 2000 compeared and claimed the whole annualrent of his L. 1280 out of the lands of Kingscroft, by virtue of his first and preferable infeftment.

Alleged for Jean Pitcairn: Seeing Haliday stands infeft both in the Kingscroft and burrow-lands, if he takes his whole annualrent out of Kingscroft, he

No 24.

longing to of his debtors, was found not obliged to assign his bond to the other arresters, for recovering from the other two co-principals the superplus paid to him out of the common debtor's effects, more than his third share, altho' relief of two-thirds was competent to the common debtor himself against these co-principals.

No 25.

The Lords found, where a posterior creditor pays a prior out of his own money, then he ought to assign simply; but if he has left him only to get his payment out of the debtor's means, he is not obliged to assign, except with a quality and